SCOT L. ZIMMERMAN, Plaintiff,

v.

STATE OF OREGON DEPARTMENT OF JUSTICE, Defendant.

CV 97-959-PA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

October 31, 1997, Decided

Plaintiff Scot L. Zimmerman brings this employment discrimination action against defendant Oregon Department of Justice. Plaintiff alleges that defendant failed to accommodate his poor eyesight while training him to work as a child support agent. Plaintiff brings claims under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 to 12213, and state law.

Defendant moves to dismiss for failure to state a claim and lack of subject matter jurisdiction. I grant the motion.

BACKGROUND

Plaintiff alleges that he began working for defendant on June 21, 1995, as a trial employee. Defendant discharged him on December 18, 1995, when he refused defendant's request that he remain on trial service.

After the state Employment Department denied unemployment benefits, plaintiff requested administrative review. The Employment Department initially denied plaintiff's claim, which included allegations of discrimination, on April

19, 1996.[1] After a hearing, the Employment Department again denied plaintiff's claim on June 19, 1996.

On December 18, 1996, plaintiff filed a complaint with the Oregon Bureau of Labor and Industries (BOLI). Johnston Affid., Attach. B.[2] Plaintiff later withdrew the BOLI complaint and filed this action on June 23, 1997.

STANDARDS

The court should not grant a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no facts in support of the claim. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). The court should construe the complaint in the light most favorable to the plaintiff. *Rosen* v. *Walters*, 719 F.2d 1422, 1424 (9th Cir. 1983).

A motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) may attack the substance of the complaint's jurisdictional allegations even though the allegations are formally sufficient. *St. Clair* v. *City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

DISCUSSION

I. Failure to File Timely Complaint With BOLI

Defendant moves to dismiss plaintiff's first two claims, which are under Title I of the ADA, 42 U.S.C. §§ 12111 to 12117, because plaintiff filed his complaint with BOLI more than 300 days after his alleged discharge. To bring an action in federal court for employment discrimination under Title I

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[1] I will accept these dates as true. Plaintiff asserts them in his response brief but not in the complaint.

[2] Plaintiff did not allege the date of the BOLI filing in his complaint. However, plaintiff does not dispute that the date was December 18, 1996. *See* Pltf.'s Memo. in Support at 2 ("Plaintiff also filed a Complaint with the Civil Rights Division of the State of Oregon on December 18, 1996.").

of the ADA, a person first must file a charge of discrimination with the federal Equal Employment Opportunity Commission (EEOC) or with a state or local agency able to grant relief from the unlawful employment practice. *See* 42 U.S.C. § 12117(a) (adopting Title VII's filing requirements, which are set forth in 42 U.S.C. § 2000e-5(e)(1)). There is a 180-day deadline for filing discrimination charges with the EEOC and a 300-day deadline for filing charges with the state or local agency. 42 U.S.C. § 2000e-*5*(e)(1). The filing deadline acts as a statute of limitations and failure to file a timely charge bars a subsequent action in federal court. *Delaware State College* v. *Ricks*, 449 U.S. 250, 256-57 (1980).

Here, plaintiff was discharged on December 18, 1995, and did not file a charge of discrimination with BOLI until December 18, 1996, well past the 300-day deadline. Plaintiff contends that he beat the deadline by filing his claim for unemployment benefits, which included allegations of discrimination, within 300 days.

I find no support for plaintiff's contention that filing a claim for unemployment benefits with the state Employment Department can be considered the equivalent of filing a claim with BOLI, even if the claim includes charges of discrimination. *Cf. Williams* v. *Board of Educ.*, 972 F. Supp. 248, 250 (S.D.N.Y. 1997) (filing complaint with U.S. Dep't of Education Office of Civil Rights not equivalent to filing with the EEOC or a state or local agency). Plaintiff does not dispute that BOLI, not the Employment Department, has a memorandum of understanding with the EEOC to accept discrimination claims. The Employment Department's jurisdiction is over unemployment insurance and compensation, not discrimination against disabled employees. *Compare* ORS 657.601 (legislature established Employment Department to "administer the unemployment laws," "provide for the operation of a state-wide employment service," manage an information system on the state labor market, and "provide child care advocacy . . .") *with* ORS 659.435 (legislature

grants Commissioner of BOLI enforcement powers to correct discrimination against disabled persons).

Plaintiff also has not shown grounds for equitable tolling. *See Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (courts have allowed equitable tolling when the claimant filed defective pleading during statutory period or was induced by the defendant's misconduct into missing the filing deadline, but not when the claimant fails to exercise due diligence); *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 151-52 (1984) (claimant who fails to act diligently cannot invoke equitable principles to excuse lack of diligence). Plaintiff's first two claims must be dismissed for failure to file a timely complaint with BOLI.

II. Employment Discrimination Claim under Title II of the ADA

Plaintiff's third claim is under Title II of the ADA, 42 U.S.C. §§ 12131 to 12134. Defendant moves to dismiss, contending that Title II does not create a cause of action for employment discrimination.

The Ninth Circuit has not addressed this issue. The Justice Department interprets Title II as prohibiting employment discrimination,[3] while courts addressing the issue are split, with a majority agreeing with the Justice Department. *See Bledsoe* v. *Palm Beach Soil and Water Conservation Dist.*, 942 F. Supp. 1439, 1443 (S.D. Fla. 1996) (collecting cases and concluding that although a majority hold that Title II creates a cause of action for employment discrimination, majority view is inconsistent with the ADA); *Dominguez* v. *City of Council Bluffs*, 974 F. Supp. 732, 1997 WL 484647, at *4 (S.D. Iowa 1997) (noting split of authority and following majority view).

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[3] 28 C.F.R. § 35.140(a) ("No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.").

I reject plaintiff's interpretation of Title II because it is inconsistent with the structure of the ADA as a whole. In Title I, Congress created a comprehensive scheme prohibiting employment discrimination. In Title II, headed "Public Services," Congress prohibited governments from discriminating against disabled persons in providing services such as public transportation or parks. *See* 42 U.S.C. § 12132 ("no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity."); *Bledsoe*, 942 F. Supp. at 1443-44. Allowing employment discrimination claims under Title II would make Title I almost completely redundant as applied to public employees.[4] After establishing a comprehensive statutory scheme in Title I to prohibit discrimination by both public and private employers, why would Congress then create a vague implied remedy for employment discrimination, available only to public employees? *But see Winfrey* v. *City of Chicago*, 957 F. Supp. 1014, 1023 (N.D. Ill. 1997) (speculating that Congress may have considered notice of employees' claims unnecessary for public employers and concluding that majority view not "so absurd as to require a different construction of the statute"). Public employees would have no reason to bring discrimination claims under Title I if Title II allowed them to take claims directly to federal court without exhausting administrative remedies. *Bledsoe*, 942 F. Supp. at 1445.

The wording of Title II also does not support plaintiff's argument. As courts on both sides of the dispute have noted, Title II does not address employment. *Bledsoe*, 942 F. Supp. at 1444; *Petersen* v. *University of Wisconsin Bd. of Regents*, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993) (coverage of em-

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[4] Title I applies to employers with fifteen or more employees, while Title II applies to all governmental entities, regardless of size or number of employees.

ployment discrimination "is not obvious from the plain language"; finding coverage based on Justice Department rule). One could broadly construe the phrase "services, programs, or activities of a public entity" to include employment. However, that reading ignores Title I's specific coverage of employment discrimination. *See Decker* v. *University of Houston*, 970 F. Supp. 575, 578 (S.D. Tex. 1997).

Plaintiff argues that I should accept the Justice Department's interpretation of Title II. However, courts are the final authorities on statutory construction, and a court must reject an agency construction that is inconsistent with the statutory mandate. *Vance* v. *Hegstrom*, 793 F.2d 1018, 1023 (9th Cir. 1986). The Justice Department's regulations are inconsistent with Title II and the entire ADA. *See Bledsoe*, 942 F. Supp. at 1448-49.

I conclude that Title II does not cover employment discrimination. Accepting plaintiff's position would create a "completely bewildering" statutory scheme:

> Both Title I and Title[] II apply to employment, although Title II says nothing at all on the subject and Title I lays out a comprehensive scheme to deal with employment issues; Title I says an employer must hire 15 employees to be sued for employment discrimination, but you can get around this under Title II if your employer is an arm of the State; Title I says you must exhaust administrative remedies, but you can ignore this requirement too if you are employed by the State. If this is really what Congress meant, then the ADA surely must rank as one of the great drafting debacles of recent times.

Bledsoe, 942 F. Supp. at 1445-46. Plaintiff's third claim must be dismissed for failure to state a claim.

III. Eleventh Amendment Immunity

Defendant moves to dismiss plaintiff's fourth claim, which is under ORS 659.425, contending that the Eleventh

Amendment bars the claim from being heard in federal court. I agree.

The Eleventh Amendment protects a state from suit by its own citizens in federal court. *Clark* v. *State of California*, 123 F.3d 1267, 1269, 1997 WL 525518, at *1 (9th Cir. 1997). A state may lose its Eleventh Amendment immunity in two ways: Congress can abrogate it by statute, or the state itself may choose to waive it. *Id.*

Plaintiff argues, correctly, that Congress abrogated Oregon's Eleventh Amendment immunity for claims brought under the ADA. *See* id. at *1-2. However, that abrogation applies only to claims under the ADA. The potential for supplemental federal jurisdiction over state law claims cannot abrogate a state's Eleventh Amendment immunity.

The other exception to Eleventh Amendment immunity, waiver by the state, also does not apply here. The court may find a waiver only when expressly stated or "by such overwhelming implication" as to leave no other reasonable interpretation possible. *See Micomonaco* v. *State of Washington*, 45 F.3d 316, 319 (9th Cir. 1995). "For a state statute to constitute waiver of Eleventh Amendment immunity, the statute at issue must specify the state's intention to be sued in federal court, because the state has a constitutional interest in where it may be sued." *Id.* The statute at issue here contains no waiver, express or implied, of Eleventh Amendment immunity. I dismiss plaintiff's state law claim for lack of subject matter jurisdiction.

CONCLUSION

Defendant's motion to dismiss (# 8) is granted.

DATED this 31st day of October, 1997.

OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

SCOT L. ZIMMERMAN, Plaintiff-Appellant,

v.

STATE OF OREGON
DEPARTMENT OF JUSTICE, Defendant-Appellee.

No. 97-36101

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

March 18, 1999, Filed

Plaintiff brought this action claiming, in part, that defendant's employment practices discriminated against him in violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, *et seq*. The district court dismissed the action, holding that Title II of the ADA does not apply to employment. Addressing this issue of first impression for the Ninth Circuit, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because this is an appeal from the dismissal of an action pursuant to Fed. R. Civ. P. 12(b)(6), we accept as true the facts alleged in the complaint. *Associated Gen. Contractors of Am.* v. *Metropolitan Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998).

On January 21, 1995, defendant hired plaintiff on a trial basis as a child support agent. Plaintiff suffers from a disabling eye condition that renders him visually impaired. During his employment, plaintiff asked that defendant reasonably accommodate his disability. Defendant refused and thereafter retaliated against plaintiff. Finally, on December 18, 1995, defendant fired plaintiff.

On June 23, 1997, plaintiff filed this action alleging that defendant had violated Titles I and II of the ADA and a similar state anti-discrimination statute. *Zimmerman* v. *Oregon Dep't of Justice*, 983 F. Supp. 1327, 1328 (D. Ore. 1997). Defendant moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(6). *Id.*

The district court first dismissed plaintiff's Title I claims, holding that plaintiff had failed to file a timely charge with the Equal Employment Opportunity Commission (EEOC). *Id.* at 1328-29. The court also dismissed plaintiff's state law claim, holding that defendant has Eleventh Amendment immunity. *Id.* at 1330-31. On appeal, plaintiff does not challenge either of those rulings.

Finally, the court dismissed plaintiff's Title II claim, holding that Title II does not apply to employment. *Id.* at 1329-30. The court acknowledged that it is possible to interpret the words of Title II broadly to cover employment. *Id.* at 1330. However, the court relied on contextual clues to reject that interpretation:

> I reject plaintiff's interpretation of Title II because it is inconsistent with the structure of the ADA as a whole. In Title I, Congress created a comprehensive statutory scheme prohibiting employment discrimination. In Title II, headed "Public Services," Congress prohibited governments from discriminating against disabled persons in providing services such as transportation or parks. Allowing employment discrimination claims under Title II would make Title I almost completely redundant as applied to public employees. After establishing a comprehensive statutory scheme in Title I to prohibit discrimination by both public and private employers, why would Congress then create a vague implied remedy for employment discrimination, available only to public employees? Public employees would have no reason to bring discrimination claims under Title I if Title II al-

> lowed them to take claims directly to federal court without exhausting administrative remedies.

Id. at 1329-30 (footnote and citations omitted). Plaintiff brings this timely appeal to challenge that decision.

STANDARD OF REVIEW

We review de novo the district court's dismissal of an action pursuant to Fed. R. Civ. P. 12(b)(6). *Steckman* v. *Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998).

DISCUSSION

A. Statutory Overview

The ADA contains five titles: Employment (Title I), Public Services (Title II), Public Accommodations and Services Operated by Private Entities (Title III), Telecommunications (Title IV), and Miscellaneous Provisions (Title V).[5] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 327-28 (1990). As those headings suggest, Title I applies specifically to employment:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

Congress has defined "covered entity" to include state employers such as defendant. The term "covered entity" includes an "employer." 42 U.S.C. § 12111 (2). In turn, "employer" includes a "person engaged in an industry affecting commerce who has 15 or more employees." 42 U.S.C. § 12111(5)(A). Completing the picture of who is covered, the

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[5] As codified, the telecommunications title is not a separate subchapter.

statute defines "person" and "industry affecting commerce" to include a governmental "industry, business or activity." *See* 42 U.S.C. § 12111(7) ("The terms 'person' . . . and 'industry affecting commerce', shall have the same meaning given such terms in section 2000e of this title."); 42 U.S.C. § 2000e(a) ("The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions . . . ."; 42 U.S.C. § 2000e(h) ("The term 'industry affecting commerce' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes . . . any governmental industry, business, or activity.").

Although Congress generally included governmental employers in Title I, it exempted the federal government from that Title. *See* 42 U.S.C. § 12111(5)(B) ("The term 'employer' does not include . . . the United States, a corporation wholly owned by the government of the United States, or an Indian tribe . . . ."). That being so, by including governmental employers in Title I, but at the same time excluding federal governmental employers, Congress was referring only to state and local governmental employers such as defendant.

Neither party disputes that Title I ordinarily would apply to plaintiff's action. However, Title I requires an employee first to file a charge with the EEOC in a timely manner. *See* 42 U.S.C. § 12117(a) (incorporating the charge requirement from Title VII of the Civil Rights Act of 1964, as amended). Plaintiff failed to satisfy that requirement and, thus, is left to argue that Title II also applies to state employment; Title II does not require him to file a charge with the EEOC.

B. Chevron deference

Title II is the "Public Services" title of the ADA. Congress required the Attorney General to promulgate regulations implementing Title II. *See* 42 U.S.C. § 12134(a). Pursuant to that grant of authority, the Attorney General has determined that Title II applies to employment:

> No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.

28 C.F.R. § 35.140(a) (1998).

Under these circumstances, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), governs our review of 28 C.F.R. § 35.140(a) and Title II. *See*, e.g., *Does 1-5* v. *Chandler*, 83 F.3d 1150, 1153 (9th Cir. 1996) (applying Chevron deference to other Title II regulations). Although the parties agree that *Chevron* applies, not surprisingly, they disagree about the outcome of a *Chevron* analysis.

In *Chevron*, the Supreme Court devised a two-step process for reviewing an administrative agency's interpretation of a statute that it administers. *See Chevron*, 467 U.S. at 842-44. *See also Bicycle Trails Council of Marin* v. *Babbitt*, 82 F.3d 1445, 1452 (9th Cir. 1996) ("The Supreme Court has established a two-step process for reviewing an agency's construction of a statute it administers."). Under the first step, we employ our "traditional tools of statutory construction" to determine whether Congress has expressed its intent unambiguously on the question before the court. *Chevron*, 467 U.S. at 843 n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. *See id.* at 843. At step two, we must uphold the administrative regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

Plaintiff and the Attorney General, as *amicus*, argue that Title II is ambiguous and thus requires us to defer to the Attorney General's regulation. Defendant, to the contrary, argues that Title II expresses Congress' intent unambiguously.

We agree with defendant. Congress unambiguously expressed its intent for Title II not to apply to employment. That being so, we end our inquiry at the first step of the *Chevron* analysis and accord the Attorney General's regulation no weight. *See National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998) ("Because we conclude that Congress has made it clear that the same common bond of occupation must unite each member of an occupationally defined federal credit union, we hold that the NCUA's contrary interpretation is impermissible under the first step of Chevron.") (emphasis in original); *Sierra Club* v. *United States Envtl. Protection Agency*, 118 F.3d 1324, 1327 (9th Cir. 1997) ("Congress has spoken clearly on the subject and the regulation violates the provisions of the statute. Our inquiry ends at the first prong of Chevron."). *See also Patterson* v. *State of Ill., Dep't of Corrections*, 1999 U.S. Dist. LEXIS 1430, No. 98-4005, 1999 WL 68373, at *8 (C.D. Ill. Jan. 26, 1999) (refusing to defer to 28 C.F.R. § 35.140(a), because "Congress clearly intended for employment disputes, whether arising from public or private employment, to be brought only under Title I of the ADA"); *Decker* v. *University of Houston*, 970 F. Supp. 575, 578 (S.D. Tex. 1997) (refusing to defer to 28 C.F.R. § 35.140(a)), *aff'd*, 159 F.3d 1355 (5th Cir. 1998) (Table).

C. Wording of Title II

Using our "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, "when interpreting a statute, [we] look[ ] first to the words that Congress used." *Sanchez* v. *Pacific Powder Co.*, 147 F.3d 1097, 1099 (9th Cir. 1998). "Rather than focusing just on the word or phrase at issue, [we] look[ ] to the entire statute to determine Congressional intent." *Id.*

Title II's operative section provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such

> disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The term "public entity" means "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(A) & (B).

As is evident, that section contains two clauses. First, 42 U.S.C. § 12132 says that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity[.]

Congress did not define any of the terms in that clause except "public entity" and "qualified individual with a disability." *See* 42 U.S.C. § 12131 (defining Title II's terms). "When a statute does not define a term, we generally interpret that term by employing the ordinary, contemporary, and common meaning of the words that Congress used." *United States* v. *Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998).

A common understanding of the first clause shows that it applies only to the "outputs" of a public agency, not to "inputs" such as employment. *See Decker*, 970 F. Supp. at 578 ("The phrase 'services, programs, and activities,' . . . understood as a whole, focuses on a public entity's outputs rather than inputs.") (citation and internal quotation marks omitted). First, employment by a public entity is not commonly thought of as a "service, program, or activity of a public entity." Second, the "action" words in the sentence presuppose that the public entity provides an output that is generally available, and that an individual seeks to participate in or receive the benefit of such an output.

Consider, for example, how a Parks Department would answer the question, "What are the services, programs, and activities of the Parks Department?" It might answer, "We

operate a swimming pool; we lead nature walks; we maintain playgrounds." It would not answer, "We buy lawnmowers and hire people to operate them." The latter is a means to deliver the services, programs, and activities of the hypothetical Parks Department, but it is not itself a service, program, or activity of the Parks Department.

Similarly, consider how a member of the public would answer the question, "What are the services, programs, and activities of the Parks Department in which you want to participate, or whose benefits you seek to receive?" The individual might answer, "I want to participate in the Wednesday night basketball league, or find out about the free children's programs for the summer months." The individual would not logically answer, "I want to go to work for the Parks Department."

We conclude, then, that the wording of the first clause does not suggest that Congress intended for Title II to apply to employment.[6] Almost all other courts have, at least implicitly, adopted the foregoing interpretation.[7] In particular, although they have held that Title II applies to employment, they have not done so because of the wording of the first clause. Instead, the courts that have considered that wording have held that it does not apply to employment. *See, e.g., Decker*, 970 F. Supp. at 578 (so holding). *See also Larramendy* v. *San Mateo County Transit Dist.*, 1998 U.S. Dist. LEXIS 11711, No. 97-3436, 1998 WL 456283, at *3 n.1 (N.D. Cal. July 30, 1998) (holding that Title II does not apply to the plaintiff's employment action, because the "plaintiff is not claiming that he was trying to avail himself of a public service, such as use of a public bus, administered by the Dis-

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[6] If there were any doubt about the meaning of the first clause, it would be resolved by resort to the statutorily defined term, "qualified individual with a disability," which we discuss in the text below.

[7] The only exception appears to be *Dominguez* v. *City of Council Bluffs, Iowa*, 974 F. Supp. 732, 736-37 (S.D. Iowa 1997).

trict; instead, he is claiming that the District, as employer, violated his rights as an employee"); *Iskander* v. *Rodeo Sanitary Dist.*, 1995 U.S. Dist. LEXIS 1620, No. C-94 0479-SC, 1995 WL 56578, at *9 (N.D. Cal. Feb. 7, 1995) ("This section concerns the rendering of services to the public by public entities, *i.e.*, public transportation. Title II is inapplicable to the District's composition of employees.") (citation and footnote omitted), *aff'd on other grounds*, 121 F.3d 715 (9th Cir. 1997) (Table).

The second clause of 42 U.S.C. § 12132 states that no qualified individual with a disability shall, by reason of such disability, . . . be subjected to discrimination by any such entity.

Some courts have held that the second clause is entirely independent from the first and that it prohibits any form of discrimination by a public entity. *See Bledsoe* v. *Palm Beach County Soil & Water Conserv. Dist.*, 133 F.3d 816, 822 (11th Cir.) ("The language of Title II's antidiscrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities,' of [a public entity]. Rather, it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.") (citation and internal quotation marks omitted), *cert. denied*, 142 L. Ed. 2d 57, 119 S. Ct. 72 (1998); *Innovative Health Sys., Inc.* v. *City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997) (same) (not an employment action). *See also Alberti* v. *City & County of San Francisco Sheriff's Dep't*, 32 F. Supp. 2d 1164, 1998 WL 954876, at *4 (N.D. Cal. 1998) ("The statute's construction evinces congressional intent to keep the term 'or be subject to such discrimination' broad. Although Congress did not insert the word 'employment' it could be read to include all forms of discrimination . . . ."); *Downs* v. *Massachusetts Bay Transp. Auth.*, 13 F. Supp. 2d 130, 135 (D. Mass. 1998) ("The [defendant] focuses exclusively on the access to the 'services, programs, or activities' of public entities guaranteed by the first prong of this section, and disre-

gards the general prohibition on discrimination provided by the second prong.").

Under that interpretation, Title II would be broad enough to include employment discrimination by a public entity. We do not, however, agree with that interpretation for two reasons: (1) it takes the key phrase out of context, and (2) it conflicts with Ninth Circuit precedent.

Initially, the placement of the second clause in the single sentence that forms 42 U.S.C. § 12132 suggests that the second clause relates back to the same "services, programs, or activities" of a public entity that the first clause covers. Moreover, of course, Title II pertains to "Public Services." *See Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) ("The title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (citation and internal quotation marks omitted). Although placement of the second clause and the heading of the section do not, by themselves, unambiguously indicate Congress' intent, the remainder of Title II does.

To prevail on a Title II claim, including a claim under the second clause, a plaintiff must prove that he or she is a "qualified individual with a disability." *See* 42 U.S.C. § 12132 (so providing); *Weinreich* v. *Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997) ("To prove a public program or service violates Title II of the ADA, a plaintiff must show . . . [that] he is a 'qualified individual with a disability.'"), *cert. denied*, 139 L. Ed. 2d 324, 118 S. Ct. 423 (1998). Title II defines that requirement:

> As used in this subchapter:
>
> The term "qualified individual with a disability" means *an individual with a disability* who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, *meets the essential eligibility requirements*

for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2) (emphasis added). A plaintiff is not "qualified" to bring any Title II claim unless he or she "meets the essential eligibility requirements" of a government service, program, or activity provided by a public entity. The second clause of § 12132 therefore must relate to a government service, program, or activity; otherwise a plaintiff is not "qualified" to bring a claim under that clause. Using the ordinary meaning of the phrase emphasized above, we return to what we said about the first clause of § 12132. Obtaining or retaining a job is not "the receipt of services," nor is employment a "program[ ] or activity provided by a public entity." Again, the "action" words in the statute assume a relationship between a public entity, on the one hand, and a member of the public, on the other. The former provides an output that the latter participates in or receives.

This court already has hinted at the foregoing interpretation of the second clause. In *Crowder* v. *Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), this court held that Congress' placement of the word "or" between the two clauses in 42 U.S.C. § 12132 indicates its intent to prohibit two things: "Due to the insertion of 'or' between exclusion from/denial of benefits on the one hand and discrimination by a public entity on the other, we conclude Congress intended to prohibit two different phenomena." *Id.* at 1483. In particular, Congress intended for the second clause to prohibit intentional discrimination, whereas it intended for the first clause to prohibit disparate treatment of the disabled. *See id.* ("Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons public services disproportionately due to their disability.").

Crowder, thus, suggests that both clauses prohibit discrimination by a public entity in providing its services, programs and activities. The clauses differ only in their method of prohibiting discrimination. *See, e.g., id.* at 1483-84 ("Few

would argue that architectural barriers to disabled persons such as stairs, or communication barriers such as the preference for the spoken word, are intentionally discriminatory. Yet, stairs can deny the wheelchair-bound access to services provided on the second floor of a government building; and communicating only by the spoken word can deny deaf persons the ability to find out that it is the second floor where they must go to obtain the services they seek.").

In summary, the second clause of 42 U.S.C. § 12132, like the first, prohibits discrimination only in a public entity's "outputs." Thus, the wording of 42 U.S.C. § 12132 does not permit an inference that Congress intended for Title II to apply to employment.

D. Structure of the ADA

Even were the wording of Title II ambiguous, by itself, the structure of the ADA as a whole unambiguously demonstrates that Congress did not intend for Title II to apply to employment. *See National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) ("In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole.").

The structure of the ADA demonstrates congressional intent in five main ways: (1) Congress placed employment-specific provisions in Title I, which it labeled "Employment," whereas Congress placed no employment-related provisions in Title II, which it labeled "Public Services." (2) Congress defined "qualified individual with a disability" differently in Title I than in Title II. In Title I, a person is "qualified" if the person can work, whereas in Title II a person is "qualified" if the person is eligible to receive services or participate in a publicly provided program. (3) Allowing employment discrimination claims under Title II would make Title I redundant as applied to public employees and would eviscerate the procedural requirements of Title I for those employees. (4)

Congress gave regulatory authority to different agencies for Title I and Title II. Congress gave authority over Title I to the EEOC, the agency that administers most federal employment-related statutes. (5) Congress expressly linked the employment-related provisions of the Rehabilitation Act to Title I of the ADA, not to Title II. We discuss each of those aspects of the ADA's structure in turn.

First, Title I contains detailed and comprehensive employment provisions. Title II, on the other hand, is completely devoid of any employment provisions. For example, in Title I ("Employment"), the term "qualified individual with a disability" speaks to a person's qualifications to work. By contrast, as discussed above, in Title II ("Public Services") a "qualified individual with a disability" means a person who is eligible to receive services or to participate in a publicly provided program or activity. *Compare* 42 U.S.C. § 12111(8) (Title I):

> As used in this subchapter:
>
> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

with 42 U.S.C. § 12131(2) (Title II):

> As used in this subchapter:
>
> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or

> transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Likewise, in Title I, "reasonable accommodation" addresses specifically the needs of the disabled in the workplace. Title II does not contain a similar definition. *Compare* 42 U.S.C. § 12111(9) (Title I):

> As used in this subchapter:
>
> The term "reasonable accommodation" may include -
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

with 42 U.S.C. § 12131 (Title II) (using the undefined term "reasonable modification").

Congress thus crafted extensive employment-specific provisions in Title I. It omitted any mention of employment in Title II. In that circumstance, we must give effect to the different wording and different focus of the two provisions. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted). *See also Patterson*, 1999 WL 68373, at *7 (relying, in part, on the different definitions of "qualified individual with a disability" to hold that

"Congress never intended for Title II to cover employment disputes").

We turn next to the principle of giving full effect to each provision of a statute. Congress consciously and expressly chose to include the employment practices of state and local governments in Title I. To hold that Title II also governs their employment practices would render Congress' special effort to ensure their inclusion in Title I superfluous. Public employees could avoid the procedural requirements of Title I by pursuing all their claims under Title II. This court generally refuses to interpret a statute in such a manner. *See Northwest Forest Resource Council* v. *Glickman*, 82 F.3d 825, 834 (9th Cir. 1996) ("We have long followed the principle that statutes should not be construed to make surplusage of any provision.") (citation and internal quotation marks omitted).

Titles I and II of the ADA incorporate their remedies and procedures from different acts: Title I incorporates provisions of Title VII of the Civil Rights Act of 1964, as amended,[8] while Title II incorporates provisions of the Rehabilitation Act.[9] Title I thereby incorporates Title VII's charge requirement, whereas Title II incorporates the Rehabilitation Act's provisions, which do not require an employee to pursue any administrative relief. *See Smith* v. *Barton*, 914 F.2d 1330,

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[8] *See* 42 U.S.C. § 12117(a) (Title I) ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5 [charge requirement], 2000e-6, 2000e-8 and 2000e-9 of this title [Title VII] shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.").

[9] *See* 42 U.S.C. § 12133 (Title II) ("The remedies, procedures, and rights set forth in section 794a of Title 29 [the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.").

1338 (9th Cir. 1990) ("Private plaintiffs suing under section 504 [of the Rehabilitation Act] need not first exhaust administrative remedies."). Allowing employment claims under Title II would render the charge requirement completely superfluous for public employees.

Next, we consider Congress' choices respecting delegation of authority to the Executive Branch. Titles I and II delegate the responsibility to promulgate regulations to different agencies. Title I requires the EEOC to issue regulations interpreting that title. 42 U.S.C. § 12116. Title II, on the other hand, gives that power to the Attorney General. 42 U.S.C. § 12134(a). If both Title I and II apply to disability discrimination in employment, then it is possible for state and local governments to be subjected to conflicting regulations.

Congress was aware of the problem that conflicting regulations could create. In response to that potential problem, Congress ordered the agencies charged with enforcing Title I (the EEOC) and the Rehabilitation Act of 1973 (the Attorney General) to "develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973." 42 U.S.C. § 12117(b). Congress' failure to include a similar provision for coordination between Titles I and II is evidence that it did not intend for the Attorney General to have any power over employment under Title II; it never envisioned that there could be a conflict.

Finally, the ADA's linkage of Title I and the Rehabilitation Act establishes that Congress thought that the ADA's employment-related provisions were embodied in Title I, not Title II. Congress made this linkage even stronger in 1992 when it amended the Rehabilitation Act to incorporate employment-related standards from Title I, not Title II:

> The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.[10]

29 U.S.C. § 794(d) (emphasis added).[11]

In conclusion, when viewed as a whole, the text, context and structure of the ADA show unambiguously that Congress did not intend for Title II to apply to employment. Under these circumstances, we do not resort to legislative history, and we do not defer to the Attorney General's regulation. *See, e.g., Sloan* v. *West*, 140 F.3d 1255, 1261 (9th Cir. 1998) ("If the intent of Congress is clear from the face of the statutory language, we must give effect to the unambiguously expressed Congressional intent."); *Moyle* v. *Director, Office of Workers' Comp. Programs*, 147 F.3d 1116, 1120 (9th Cir. 1998) ("When interpreting a statute, we ordinarily first look to the plain meaning of the language used by Congress. But if the statute is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpretation.") (citation and internal quotation marks omitted), *petition for cert. filed*, 67 U.S.L.W. 3394 (U.S. Dec. 3, 1998) (No. 98-927).[12]

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[10] The other cited sections of the ADA are among the "Miscellaneous Provisions."

[11] Ordinarily, the 1992 Congress' interpretation of a 1990 statute would provide no guidance. However, 1992 was the first year in which the ADA took effect, so the 1992 Congress was the first Congress that had to address the interrelationship between the ADA and the Rehabilitation Act.

[12] The Eleventh Circuit in Bledsoe stated that "extensive legislative commentary regarding the applicability of Title II to employment discrimination, however, is so pervasive as to belie any contention that Title II does not apply to employment actions." *Bledsoe*, 133 F.3d at 821. We again part ways with the Eleventh Circuit. We have reviewed the legislative

E. Rehabilitation Act

1. Express incorporation

Plaintiff and *amicus* argue that Title II expressly incorporates the Rehabilitation Act's prohibition on employment discrimination. We disagree.

Plaintiff and *amicus* rely, first, on 42 U.S.C. § 12133, which provides:

> The remedies, procedures, and rights set forth in section 794a of Title 29 [the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

(Emphasis added.) Because one of the "rights" in the Rehabilitation Act is the right to be free from employment discrimination, plaintiff and amicus argue, 42 U.S.C. § 12133 incorporates that "right" into Title II.

However, 42 U.S.C. § 12133 incorporates only one section of the Rehabilitation Act: 29 U.S.C. § 794a. That section includes the Rehabilitation Act's procedural rights, not its substantive rights. Congress' choice to incorporate one section of the Rehabilitation Act, which provides certain procedures, does not demonstrate that Congress also intended to incorporate the rest of the Rehabilitation Act's substance. Indeed, it demonstrates precisely the opposite. *See, e.g., Longview Fibre Co.* v. *Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) ("No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated. In this case, *expressio unius est exclusio alterius*.").

Second, plaintiff and amicus rely on 42 U.S.C. § 12134(b), which provides in part:

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history thoroughly and find it ambiguous at best. More importantly, we are bound by what Congress actually enacted.

> Regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29.

They argue that, because 28 C.F.R. § 41.1 *et seq.* (1989) prohibited employment discrimination, the foregoing provision demonstrates Congress' intent to incorporate that prohibition into Title II. *See* 28 C.F.R. §§ 41.52-41.55 (so prohibiting). *See also* 28 C.F.R. § 35.140 App. A ("The statutory language of section [12134] of the ADA requires the Department to issue a regulation that is consistent with the ADA and the Department's coordination regulation under section 504, 28 C.F.R. part 41. The coordination regulation specifically requires nondiscrimination in employment."). We again disagree.

Unlike 42 U.S.C. § 12133, 42 U.S.C. § 12134(b) does not suggest that Congress intended to incorporate any provisions from the Rehabilitation Act into Title II. Instead, 42 U.S.C. § 12134(b) merely requires the Attorney General to ensure that the regulations are "compatible" to the extent that they overlap. *See, e.g.*, Webster's Third New Int'l Dictionary 484 (unabridged ed. 1993) ("Consistently [means] . . . compatibly . . . congruously . . . [or] in harmony with."). The regulations in question embrace four main topics: They define terms such as "handicap" or "disability"; list types of prohibited discrimination in programs, activities, and services; list types of prohibited discrimination in employment; and set accessibility standards. Because of the several topics, of which employment is but one, we infer that Congress intended employment to be an area of regulatory overlap.

We conclude that Congress did not expressly incorporate the substantive employment provisions of the Rehabilitation Act into Title II.

2. Implied incorporation

Even if Title II of the ADA does not expressly incorporate the Rehabilitation Act's substantive employment rights, plaintiff and *amicus* argue, it impliedly incorporates those rights. We are not persuaded.

Congress did model Title II on the Rehabilitation Act. *See Weinreich*, 114 F.3d at 978 ("Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act . . . ."). Plaintiff and amicus argue that, because Title II merely expands the reach of the Rehabilitation Act, Title II must also apply to employment.

Unlike the Rehabilitation Act, Title II applies to all public entities, whether or not they receive federal financial assistance. Thus, in some respects, it is true that Congress broadened the provisions of the Rehabilitation Act in Title II.

On the other hand, the Rehabilitation Act also applied (and still does apply) to private entities that receive federal financial assistance. *See* 29 U.S.C. § 794(b) ("The term 'program or activity' means all operations of . . . an entire corporation, partnership, or other private organization . . . .") (emphasis added). *See also Jacobson* v. *Delta Airlines, Inc.*, 742 F.2d 1202, 1209 (9th Cir. 1984) (holding that private airlines are subject to the Rehabilitation Act if they receive federal subsidies). Congress did not make private entities subject to Title II; instead, they are subject only to Titles I, III, and V. In other words, Congress also limited the reach of the Rehabilitation Act in Title II.

In the circumstances, Congress' use of the Rehabilitation Act as a model for Title II does not, standing alone, evidence Congress' intent to incorporate the employment provisions from that Act into Title II, as distinct from Title I. Rather, we must examine carefully the similarities and differences between the two statutes to determine whether Congress had such an intent.

Plaintiff and *amicus* note that Title II contains wording that is similar to the wording found in § 504 of the Rehabilitation Act. Before the enactment of the ADA, the Supreme Court had held that § 504 applies to employment. *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 631-34 (1984). Plaintiff and *amicus* argue that we must interpret Title II, likewise, to apply to employment. *See, e.g.*, *Bledsoe*, 133 F.3d at 821 ("It is significant that Congress intended Title II to work in the same manner as Section 504 of the Rehabilitation Act, because Section 504 was so focused on employment discrimination that Congress enacted subsequent legislation to clarify that Section 504 applied to other forms of discrimination in addition to employment discrimination.") (citing *Consolidated Rail*, 465 U.S. at 626-32); *Alberti*, 1998 WL 954876, at *5 ("Congress modeled Title II of the ADA after the Rehabilitation Act. . . . When Congress passed the ADA in 1990, it was clearly established that the Rehabilitation Act covers employment discrimination.") (citing *Consolidated Rail*, 465 U.S. at 624); *Downs*, 13 F. Supp. 2d at 135 ("Language in § 504 very similar to that of 42 U.S.C. § 12132 (and similarly devoid of express reference to employment) had long been understood to prohibit employment discrimination.") (citing *Consolidated Rail*, 465 U.S. at 632); *Ethridge* v. *Alabama*, 847 F. Supp. 903, 906 (M.D. Ala. 1993) ("A primary purpose of § 12131 was to extend the reach of § 504 of the Rehabilitation Act of 1973 . . . Section 504, including its amendments and regulations, clearly applies to employment discrimination.") (citing *Consolidated Rail, 465 U.S. at 626).*

The answer is not so simple, for four reasons. (1) Textually, Congress did not borrow the wording of § 504 verbatim when it drafted Title II, although the phrasing of the two statutes is similar. (2) Contextually, surrounding sections of the Rehabilitation Act relate explicitly to employment, whereas no section of Title II relates to employment. (3) The Congressional purpose to cover employment could not be carried out

under the Rehabilitation Act except by construing its sole operative provision, § 504, to encompass employment, whereas the Congressional purpose to cover employment is carried out in a separate operative provision of the ADA (Title I). (4) Congress has linked the Rehabilitation Act to Title I, but not Title II, of the ADA.

We turn first to the statutory text. "When a legislature borrows an already judicially interpreted phrase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of that phrase." *Long* v. *Director, Office of Workers' Comp. Programs*, 767 F.2d 1578, 1581 (9th Cir. 1985) (citation and internal quotation marks omitted). *See also Collings* v. *Longview Fibre Co.*, 63 F.3d 828, 832 n.3 (9th Cir. 1995) ("The legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA."). That rule of interpretation makes sense, however, only when the new statute contains materially the same phrase as is found in the old statute. Here, Congress chose not to adopt the broad wording of the Rehabilitation Act.

When the Supreme Court interpreted § 504 of the Rehabilitation Act, that section provided in part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (1984) (emphasis added); *Consolidated Rail*, 465 U.S. at 632. The Rehabilitation Act's phrase "under any program or activity receiving Federal financial assistance" is

broader than Title II's phrase, "in . . . the services, programs, or activities of a public entity."

The focus of the emphasized phrase in § 504 of the Rehabilitation Act is the receipt of Federal financial assistance. *See Consolidated Rail*, 465 U.S. at 631-36 (discussing the meaning of the requirement that a program receive Federal financial assistance). Discrimination is prohibited under any program or activity that receives such assistance. This focus naturally encompasses the entire operation of the program or activity, for its federal funding may well flow into compensation for employees.

To the extent that there was any ambiguity about the breadth of that wording when the Supreme Court decided *Consolidated Rail*, Congress amended § 504 in 1988 to make its breadth clear. That amendment defined the term "program or activity" to include "all of the operations" of the entity.[13]

By contrast, the focus of Title II of the ADA is on the services, programs, or activities that a public entity provides. That is an outward-looking focus.

In summary, when Congress enacted the ADA, § 504's "under any program or activity" wording was very broad. Congress' decision to use a narrower phrase in Title II indicates its intent for Title II not to be coextensive with the Rehabilitation Act.

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[13] Title 29 U.S.C. § 794(b) provides in part:

> For the purposes of this section, the term "program or activity" means all of the operations of -
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government[.]

Moreover, unlike Title II of the ADA, the Rehabilitation Act contained several employment-related provisions. For example, Congress limited the application of § 504 to an "otherwise qualified handicapped individual in the United States, as defined in section 706(7)." 29 U.S.C. § 794 (1984). In turn, 29 U.S.C. § 706(7) defines that term solely in relation to employment. *See* 29 U.S.C. § 706(7)(A) (1984) ("The term 'handicapped individual' means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment; and (ii) can reasonably be expected to benefit in terms of employability.") (emphasis added). *See also* 29 U.S.C. § 706(7)(B) (1984) ("For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.") (emphasis added).

In fact, one of Congress' express purposes in enacting the Rehabilitation Act was to "promote and expand employment opportunities in the public and private sectors for handicapped individuals." *See Consolidated Rail*, 465 U.S. at 626 (quoting 29 U.S.C. § 701(8) (1973)). These textual and contextual clues demonstrated that Congress intended for the Rehabilitation Act to apply to employment despite the absence of an express mention of employment in § 504 itself.

By contrast, Title II contains no employment-specific provisions. Congress placed all of those provisions in Title I. Unlike the ADA, the Rehabilitation Act has no separate title specifically governing employment. *See, e.g., Consolidated Rail*, 465 U.S. at 632 n.13 (contrasting the Civil Rights Act of 1964 because, "as the Court of Appeals observed, it was unnecessary to extend Title VI more generally to ban employ-

ment discrimination, as Title VII comprehensively regulates such discrimination").

The Supreme Court's interpretation of Title IX of the Education Amendments of 1972 (which the Supreme Court also has held applies to employment) highlights the effect of that difference in statutory structure. *See North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982) (construing Title IX). Title IX provides in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a) (emphasis added). As does the Rehabilitation Act, Title IX contains the phrase "under any . . . program or activity receiving Federal financial assistance," which is broader than the corresponding phrase in Title II of the ADA. The Supreme Court noted that the wording of Title IX was "broad" and that it "favored" inclusion of employees. *North Haven*, 456 U.S. at 520, 522. Even so, before concluding that Title IX covered employment, the Court reasoned:

> If we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language. Because [Title IX] neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these "persons" unless other considerations counsel to the contrary.

Id. at 521 (emphasis added) (citations and internal quotation marks omitted).

There is no need under the ADA to interpret Title II broadly "to give [the ADA] the scope that its origins dictate." Unlike both Title IX and the Rehabilitation Act, the ADA contains a detailed, separate employment discrimination title.

Title I protects nearly all state and local government employees even if Title II does not apply to employment. *See Bledsoe* v. *Palm Beach Soil & Water Conserv. Dist.*, 942 F. Supp. 1439, 1444 n.4 (S.D. Fla. 1996) ("The Court recognizes that the Supreme Court has construed similar language in the Rehabilitation Act to include employment. However, the Rehabilitation Act only applied to any 'program or activity,' and added that these were to be construed to include 'all operations' of the covered entities. The Court believes that by . . . creating an entire new section devoted to employment, Congress meant to bifurcate the ADA into one section dealing with public and private employment relationships, and one section dealing with government services.") (citation omitted), *rev'd*, 133 F.3d 816 (11th Cir.), *cert. denied*, 119 S. Ct. 72 (1998).[14]

Finally, as noted above, Congress amended the Rehabilitation Act to incorporate the employment provisions from Title I of the ADA. *See* 29 U.S.C. § 794(d) (quoted at p. 2345 above). Because Congress expressly linked the Rehabilitation Act's employment provisions to Title I (but not to Title II), "it would seem rather bizarre to find an employment cause of action in Title II of the ADA on the grounds that Title II is tied to the Rehabilitation Act, when the Rehabilitation Act itself ties its employment cause of action to Title I." *Bledsoe*, 942 F. Supp. at 1446.

In summary, the Rehabilitation Act does not provide a basis for interpreting Title II to apply to employment. To the contrary, the differences between that Act and Title II further support the conclusion that Congress did not intend for Title II to apply to employment.

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[14] As the citation shows, the Eleventh Circuit has reversed the district court's decision in Bledsoe. We cite the district court's decision for the strength of its reasoning and not the force of its authority.

F. Precedent

We are mindful that most courts have held that Title II applies to employment. Ordinarily, we would find it difficult to hold that the wording of a statute unambiguously indicates a contrary congressional intent in the face of such precedent. However, those courts generally have ignored the wording of Title II altogether,[15] including the definition of "qualified individual with a disability" from that Title and the surrounding words in 42 U.S.C. § 12132. Instead, they have: (1) assumed without analysis that Title II applies to employment,[16] (2) relied only on the Attorney General's regulation and the legislative history of the ADA, without discussion of the statutory text and context,[17] (3) relied on the Rehabilitation Act without

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[15] The major exception is the Eleventh Circuit's decision in *Bledsoe*. Like the cases listed infra at footnote 13, that court relied primarily on the ADA's legislative history and the Attorney General's regulation. *See Bledsoe*, 133 F.3d at 821-22. However, the court also justified its result with reference to the second clause of § 12132, which it described as a "'catch-all phrase that prohibits all discrimination by a public entity.'" *Id.* at 822 (citation omitted); *See also Alberti*, 1998 WL 954876, at *4 (relying on the second clause of § 12132); *Downs*, 13 F. Supp. 2d at 135 (relying on the second clause of § 12132). However, for reasons that we already have discussed, we do not think that this reading of the statutory text is correct.

[16] *See, e.g., Holmes* v. *Texas A & M Univ.*, 145 F.3d 681, 683-84 (5th Cir. 1998); *Doe* v. *University of Maryland Med. Sys.*, 50 F.3d 1261, 1264-65 & n.9 (4th Cir. 1995); *Motto* v. *City of Union City*, 1997 WL 816509, at *8 (D.N.J. Aug, 27, 1997); *Davoll* v. *Webb*, 943 F. Supp. 1289, 1297 (D. Colo. 1996); *Dertz* v. *City of Chicago*, 912 F. Supp. 319, 323-25 (N.D. Ill. 1995), *reconsidered in part on other grounds*, 1997 WL 85169 (Feb. 24, 1997); *Doe* v. *County of Milwaukee*, 871 F. Supp. 1072, 1074 (E.D. Wis. 1993); *Eisfelder* v. *Michigan Dept. of Natural Resources*, 847 F. Supp. 78, 83-84 (W.D. Mich. 1993); *Finley* v. *Giacobbe*, 827 F. Supp. 215, 219 n.3 (S.D.N.Y. 1993).

[17] *See, e.g., Hernandez* v. *City of Hartford*, 959 F. Supp. 125, 133 (D. Conn. 1997) ("On its face, Title II prohibits discrimination in 'public services'. A plain reading of the section does not reveal whether Title II covers employment discrimination addressed more specifically in Title I. The regulations under and the legislative history of ADA Title II make it

analyzing whether Congress intended to incorporate its prohibition against employment discrimination into Title II,[18] or (4) relied solely on the foregoing precedent without independent consideration of the problem.[19] Because of the limited analysis performed in those cases - in particular, their failure to consider the statutory text and context carefully - we simply do not find them persuasive.

CONCLUSION

We realize that our decision creates an inter-circuit split of authority. Although we are hesitant to create such a split, and we do so only after the most painstaking inquiry, we must follow the unambiguously expressed intent of Congress. We therefore hold that Title II does not apply to employment.

AFFIRMED.

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clear, however, that § 12132 prohibits employment discrimination by public entities on the basis of disability.") (footnote and citation omitted); *Wagner* v. *Texas A & M Univ.*, 939 F. Supp. 1297, 1309 (S.D. Tex. 1996) ("Although it is not apparent from the plain language of § 12132, the regulations issued by the Department of Justice make it clear that the prohibition against discrimination by public entities includes employment discrimination."). *See also Winfrey* v. *City of Chicago*, 957 F. Supp. 1014, 1023 n.7 (N.D. Ill. 1997) (similar); *Silk* v. *City of Chicago*, No. 95 C 0143, 1996 WL 312074, *10 (N.D. Ill. June 7, 1996) (similar); *Benedum* v. *Franklin Township Recycling Center*, No. 95-1343, 1996 WL 679402, at *5 (W.D. Pa. Sept 12, 1996) (similar); *Petersen* v. *Univ. of Wisconsin Bd. of Regents*, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993) (similar).

[18] *See, e.g., Bledsoe*, 133 F.3d at 821; *Alberti*, 1998 WL 954876, at *5; *Downs*, 13 F. Supp. 2d at 135; *Ethridge*, 847 F. Supp. at 906.

[19] *See, e.g., Saylor* v. *Ridge*, 989 F. Supp. 680, 688 (E.D. Pa. 1998) ("We are inclined to follow the reasoning and holdings of our brethren which *also* appears to be the view followed by the majority of courts nationwide which have confronted this issue."). *See also Magee* v. *Nassau County Medical Center*, 27 F. Supp. 2d 154, 159 (E.D.N.Y. 1998) (similar); *Fobar* v. *City of Dearborn Heights*, 994 F. Supp. 878, 885 n.3 (E.D. Mich. 1998) (similar); *Bruton* v. *Southeastern Penn. Transp. Auth.*, No. 94- CV-3111, 1994 WL 470277, at *2 (E.D. Pa. Aug. 19, 1994) (similar).

SCOT L. ZIMMERMAN, Plaintiff-Appellant,

v.

STATE OF OREGON
DEPARTMENT OF JUSTICE, Defendant-Appellee.

No. 97-36101

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

July 28, 1999, Filed

The panel has voted to deny the petition for rehearing *en banc*.

The full court was advised of the petition for rehearing *en banc*. A judge of the court requested a vote on whether to rehear the matter *en banc*. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing *en banc* is DENIED.

REINHARDT, Circuit Judge, with whom Circuit Judges PREGERSON and HAWKINS join, dissenting from the denial of reconsideration *en banc*:

I dissent from the court's refusal to reconsider, *en banc*, the panel's decision in this important case of national significance. The panel's opinion holding that Title II of the Americans with Disabilities Act (ADA) does not prohibit employment discrimination by public entities is directly contrary to the plain language of the statute, to the clearly expressed intent of Congress, and to the Department of Justice's authoritative implementing regulations. Moreover, the panel's

opinion conflicts either directly or indirectly with the position taken by every circuit to confront the question, including ours, *See Norman-Bloodsaw* v. *Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1272 (9th Cir. 1998) (applying, without discussion, Title II to employment discrimination claim); *Bledsoe* v. *Palm Beach County Soil and Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998) (holding that Title II applies to employment discrimination); *Castellano* v. *City of New York*, 142 F.3d 58 (2d Cir. 1998) (applying Title II to employee benefits discrimination claim); *Holmes* v. *Texas A & M*, 145 F.3d 681, 684 (5th Cir. 1998) (applying Title II to employment discrimination claim); *Doe* v. *University of Maryland Medical Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995) (applying Title II to employment discrimination claim using same standards as under Rehabilitation Act), as well as with 18 of the 21 published district court opinions addressing the issue.[1] The Ninth Circuit now stands alone in adopting an

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[1] *Saylor* v. *Ridge*, 989 F. Supp. 680 (E.D. Pa. 1998); *Magee* v. *Nassau County Medical Center*, 27 F. Supp. 2d 154 (E.D.N.Y. 1998); *Fobar* v. *City Dearborn Heights*, 994 F. Supp. 878 (E.D. Mich. 1998); *Alberti* v. *City and County of San Francisco*, 32 F. Supp. 2d 1164 (N.D. Cal. 1998); *Downs* v. *Massachusetts Bay Transp. Auth.*, 13 F. Supp. 2d 130 (D. Mass. 1998); *Winfrey* v. *City of Chicago*, 957 F. Supp. 1014 (N.D. Ill. 1997); *Dominguez* v. *City of Council Bluffs*, 974 F. Supp. 732 (S.D. Iowa 1997); *Hernandez* v. *City of Hartford*, 959 F. Supp. 125 (D. Conn. 1997); *Roe* v. *County Comm'n of Monongalia*, 926 F. Supp. 74 (N.D. W. Va. 1996); *Graboski* v. *Guiliani*, 937 F. Supp. 258 (S.D.N.Y. 1996); *Wagner* v. *Texas A & M Univ.*, 939 F. Supp. 1297 (S.D. Tex. 1996); *Davoll* v. *Webb*, 943 F. Supp. 1289 (D. Colo. 1996); *Dertz* v. *City of Chicago*, 912 F. Supp. 319 (N.D. Ill. 1995); *Doe* v. *County of Milwaukee*, 871 F. Supp. 1072 (E.D. Wisc. 1993); *Eisfelder* v. *Michigan Dep't of Natural Resources*, 847 F. Supp. 78 (W.D. Mich. 1993); *Finley* v. *Giacobbe*, 827 F. Supp. 215 (S.D.N.Y. 1993); *Petersen* v. *University of Wisconsin Bd. of Regents*, 818 F. Supp. 1276 (W.D. Wisc. 1993); *Ethridge* v. *State of Alabama*, 847 F. Supp. 903 (M.D. Ala. 1993). Two of the three district court opinions agreeing with *Zimmerman* have already been overruled: *Bledsoe* v. *Palm Beach Soil and Water Conservation Dist.*, 942 F. Supp. 1439 (S.D. Fla. 1996), *rev'd*, 133 F.3d 816 (11th Cir. 1998), and *Decker* v. *University of Houston*, 970 F. Supp. 575 (S.D. Tex. 1997). *Decker* is no longer good

interpretation of the ADA that deprives disabled persons of a right expressly granted them by Congress - the right to bring an action for employment discrimination under Title II of the ADA.

Overview

The panel holds that the "plain meaning" of Title II of the ADA excludes discrimination in employment from the otherwise broad anti-discrimination prohibition of that Title. Such is not only not the plain meaning of Title II, but the panel's interpretation is directly contrary to the express language of the Title, to the unequivocal legislative history of the Title and to the uniform administrative interpretations of the Title rendered by the agency charged by Congress with that function. Title II contains two independent clauses, each of which serves to prohibit discrimination in employment. The Title contains no language of exclusion and the panel points to none. Rather it relies on a concept of its own creation - "inputs" and "outputs" - a concept found nowhere in the statute, or in any of the pertinent materials, as well as on a structural argument not accepted by any other circuit court. The panel's mode of statutory analysis at most results in a question of statutory ambiguity. However, if Title II were ambiguous, we would still be required by the applicable rules of statutory construction to hold that it covers every form of discrimination, including employment discrimination. Thus, the panel is compelled to base its decision exclusively on its plain meaning argument, an argument that cannot survive serious scrutiny.

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law, given the Fifth Circuit's contrary opinion in *Holmes*. Thus, *Patterson* v. *Illinois Dep't of Corrections*, 35 F. Supp. 2d 1103 (C.D. Ill. 1999) provides the slim reed of support on which *Zimmerman* rests. In addition to these published cases, 4 out of 6 unpublished district court decisions disagree with *Zimmerman*.

A. Plain Meaning of the ADA

The plain meaning of Title II is that it prohibits employment discrimination as well as all other forms of discrimination by public entities against the disabled. The ADA was enacted by Congress in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II provides that no disabled individual:

> shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

42 U.S.C. § 12132. The panel concludes that this language obviously and unambiguously excludes discrimination in employment from its purview. Yet, there is nothing in the plain meaning of the words that even suggests, let alone mandates, this result. The words themselves are self-evidently broad and inclusive. There are two clauses; each of which, properly construed, includes a proscription on workplace discrimination.

1. First Clause

The first clause bars discrimination in any of the "programs, services, or activities" of a local governmental entity. The plain and ordinary meaning of "activity" clearly does not exclude hiring or employing workers. Indeed, putting people to work is often the chief "activity" of municipalities. Although Title II does not define these terms, the Rehabilitation Act - with which Congress specified that Title II is to be interpreted consistently - does. *See* 42 U.S.C. § 12133 (providing that "remedies, procedures, and rights" under Title II are the same as those provided in § 794a of the Rehabilitation Act); 42 U.S.C. § 12134 (providing that Title II should be interpreted consistently with regulations under the Rehabilitation Act). Section 508 of the Rehabilitation Act defines "program or activity" as "all of the operations" of the govern-

mental entity. 29 U.S.C. 794(b); *Innovative Health Sys., Inc.* v. *City of White Plains*, 117 F.3d 37, 44 (2d Cir. 1997) (holding that "activity" under Title II has same meaning as "activity" under the Rehabilitation Act and includes all operations of the entity).

Furthermore, the Supreme Court has specifically interpreted the "programs and activities" language in the Rehabilitation Act to include employment, and thus to bar employment discrimination. *Consolidated Rail* v. *Darrone*, 465 U.S. 624, 631-34 (1984). The language at issue here (Title II) is unquestionably broader than that in Consolidated Rail, particularly as Title II, unlike the Rehabilitation Act, contains an independent discrimination clause banning all discrimination, in addition to the clause which the Supreme Court construed: the "programs and activities" provision that is common to both statutes. Thus, there can be no justification for concluding, as the panel does, that Title II is somehow narrower. Indeed, applying Title II to discrimination in employment, the Fourth Circuit concluded that the same standard applies to employment discrimination actions brought under Title II and the Rehabilitation Act, because, as Judge Wilkins wrote for the court, in an opinion joined by Judges Wilkinson and Luttig, "the language of the Rehabilitation Act and Title II is substantially the same." *Doe* v. *University of Maryland Medical Sys. Corp.*, 50 F.3d 1261, 1264 (4th Cir. 1995). Moreover, the ADA contains a further provision stating that "nothing in this chapter [the ADA] shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title. 42 U.S.C. § 12201(a). Where, as here, the language is not only similar, but indeed broader, it must be accorded at a minimum the same meaning - i.e., prohibiting employment discrimination.

The panel attempts to distinguish the Supreme Court decision in Consolidated Rail by pointing out that the Rehabilitation Act, unlike the ADA, was limited to those governmental

entities receiving federal funds. Thus, according to the panel, the Supreme Court interpreted the Rehabilitation Act to bar employment discrimination because it was possible that federal funds "may well flow into compensation for employees." The panel overlooks the fact, however, that in Consolidated Rail, the Supreme Court expressly rejected the argument that Congress was concerned about whether the federal funds were to be used to promote employment, and instead said that the Act was intended to "prohibit[] employment discrimination regardless of the purpose of federal financial assistance." 465 U.S. at 632.

Despite the overwhelming legal authority that the phrase "services, programs, and activities" under Title II is to be interpreted consistently with the phrase "programs and activities" under the Rehabilitation Act, and thus to include employment discrimination, the panel arrives at precisely the opposite conclusion. In so doing, the panel rests its determination almost entirely on an erroneous and non-existent dichotomy between "inputs" and "outputs," asserting that employment is in the former category, while "programs, services, or activities" fall within the latter.

The distinction between "inputs" and "outputs" finds no support whatever in the statutory language (or in the legislative or administrative history). Indeed, the approach was first concocted by a district court in Florida in a decision that has since been reversed in an Eleventh Circuit opinion holding that Title II does apply to employment discrimination. *See Bledsoe* v. *Palm Beach Soil and Water Conservation Dist.*, 942 F. Supp. 1439, 1443 (S.D. Fla. 1996), *rev'd*, 133 F.3d 816 (11th Cir. 1998).[2] The input-output format adopted by

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[2] The input-output distinction was also adopted by a district court in Texas, *see Decker*, 970 F. Supp. at 578, but that decision was subsequently implicitly overruled by the Fifth Circuit when it applied Title II to discrimination in employment. *See Holmes* v. *Texas A & M University*, 145 F.3d 681, 684 (5th Cir. 1998).

the panel will plunge district courts, and this court as well, into the impossible task of categorizing municipal and state functions and activities into two newly created categories - inputs and outputs - categories heretofore unknown to Congress or the affected administrative agencies, to local or state governments, or to the federal or state courts, with no standards or definitions to guide the entities or parties involved. In any event, it is certainly hard to find "inputs" and "outputs" in the plain meaning of Title II.

In reaching its decision that the plain meaning of Title II excludes discrimination in employment from its coverage, the panel also ignores the A.D.A.'s clear command that Title II be interpreted consistently with the regulations issued under the Rehabilitation Act. 42 U.S.C. § 12134. The particular regulations specified in the text of the statute include specific prohibitions against employment discrimination. The panel refused, however, to consider that statutory command as evidence that Title II prohibits employment discrimination because, it said, "employment is but one" of the topics covered by the regulations. Slip Op. at 2348. The panel does not, however, offer any reason why that fact should justify ignoring the specific statutory requirement that those particular regulations affecting employment discrimination be made applicable. Similarly, the panel refuses to give effect to the statute's directive in § 12133 that the "remedies, procedures, and rights" under Title II shall be identical with those under § 504 of the Rehabilitation Act. The referenced section of the Rehabilitation Act, in turn, provides that the "remedies, procedures, and rights [of Title VI of the Civil Rights Act] shall be available to any employee or applicant for employment . . . ." 29 U.S.C. 794a (emphasis added). The panel concludes that this plain language does not demonstrate a congressional intent to grant victims of employment discrimination a cause of action, i.e. rights, under Title II because that section of the Rehabilitation Act deals only with "procedural" rights. This reasoning completely ignores the fact that the rights addressed

are those of "any employee or applicant for employment." In this circumstance, it is irrelevant whether the rights are viewed as "procedural" or "substantive," although it is difficult, in any event, to comprehend why the panel concludes that they are plainly only procedural.

2. Second Clause

The plain meaning of the second clause of § 12132 even more clearly encompasses employment discrimination - if that is possible. The second clause is separated from the first by a comma followed by "or be subjected to discrimination by any such entity." The second and independent clause, like the first, does not contain any language which limits it to an "outward" focus; nor does its language in any way limit the flat and unqualified statutory prohibition against discrimination by any public entity. Certainly, nothing in the statutory language purports to exclude discrimination in employment. To the contrary, the second clause plainly and unequivocally prohibits covered entities from engaging in any discrimination. The panel, however, concludes that the second clause also applies only to discrimination in the provision of "services, programs, and activities" and cites *Crowder* v. *Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), for support. *Crowder* in no way supports the panel's opinion; indeed, it is pertinent only to the extent that it emphasizes the "or" that separates the two independent clauses, and the substantive differences in congressional intent with respect to these clauses. The only issue in *Crowder* was whether discrimination with respect to "services, programs, and activities" need be direct and intentional, and the court said, "no," a holding of no relevance here.

The proper construction of the second clause was afforded it by both the Eleventh and the Second Circuits. In *Bledsoe*, the Eleventh Circuit wrote:

> As the Second Circuit found in *Innovative Health Systems, Inc.* v. *City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997), "the language of Title II's antidiscrimi-

> nation provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of [a public entity]. Rather, it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context, ..." Accordingly, employment coverage is clear from the language and structure of Title II.

Bledsoe, 133 F.3d at 821. To conclude that the panel clearly erred in holding that the plain meaning of Title II is that it is inapplicable to discrimination in employment, we need only look to what the Second and Eleventh Circuits have unequivocally stated regarding the Title's second and independent clause. "It is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context . . . ." *Id.*

The panel supports its niggardly construction of the second clause by suggesting that Title II's definition of "qualified individual with a disability" somehow excludes coverage for employment discrimination. Its argument essentially is that the definition of that term in 42 U.S.C. § 12131(2) necessarily limits Title II's coverage to "services, programs or activities." Slip Op. at 2338-39. There are two obvious problems with this argument. First, it would read the second clause of § 12132 - "or be subjected to discrimination" - entirely out of the statute and render it redundant. Second, as noted above, both Congress and the Supreme Court have already made it absolutely clear that programs and activities as used in the Rehabilitation Act - with which the ADA is to be interpreted consistently, *see Bay View Addiction Research and Treatment, Inc.* v. *City of Antioch,* 1999 WL 351126, at *3 (9th Cir. June 3, 1999), does cover employment. At most, the definition of a disabled person in the definition section of Title II raises a question, or creates an ambiguity, regarding the meaning of Title II's language. It does not in any way "plainly" exclude employment discrimination from the purview of a statute that, on its face, clearly covers it.

As the Eleventh Circuit concluded in *Bledsoe*: "Accordingly, employment coverage is clear from the language and structure of Title II." *Id.* In sum, the plain language of Title II prohibiting "discrimination," coupled with the plain language of other parts of Title II that incorporate by reference parts of the Rehabilitation Act, demonstrates that Congress unambiguously intended to include, and did include, employment discrimination within the scope of Title II. Such coverage is provided for in the plain language of both the first and the second clauses of § 12132, as indeed are all forms of discrimination by public entities. Thus, the panel's conclusion that the plain meaning of the statute compels the opposite result - that Title II excludes employment discrimination from its coverage - is to misread the statutory language completely.

3. Structure

The panel states that Title I of the ADA prohibits discrimination in employment, and then treats Titles I and II as necessarily mutually exclusive, although other circuits have consistently construed them as overlapping. *See e.g.*, *Bledsoe*, 133 F.3d at 820. In insisting on a necessary mutual exclusivity, the panel ignores the plain statutory language of Title II and relies on an entirely unsupportable theory that applying Title II to employment discrimination would render Title I superfluous. In this respect as well, the panel clearly errs. There are differences in the scope of coverage of employment discrimination under Title I and Title II (Title I covers employers with 15 or more employees, while Title II covers all public employers, regardless of size), the two Titles evolved from different civil rights laws (Title I is modeled on Title VII of the 1964 Civil Rights Act, while Title II is modeled on the Rehabilitation Act and Title VI of the 1964 Civil Rights Act), and there is a difference in the forms of relief (compensatory and punitive damages are available under Title I, but may not be under Title II), and the procedures to be followed (administrative exhaustion is required under Title I but not under Title II). Thus, the provisions of the two Titles

are not coextensive; although both apply to employment, neither is redundant.

Congress's decision to provide two approaches to remedying discrimination in employment in one complex disability statute has caused some to question the wisdom of its policy and its rationale. It is, of course, not our function to do so. *See United States* v. *Burdeau*, 1999 WL 421319, at *2 (9th Cir. 1999) (Kozinski, J., dissenting from the order rejecting the suggestion for rehearing *en banc*). In any event, if the fact that two Titles appear to address the same general area of discrimination raises some doubt about the meaning of one or both Titles, the statute is, at most, ambiguous, and it is the unequivocal legislative history to which we must turn.

Before doing so, I would add that the panel acted properly in examining the statute's structure and the statute as a whole, as well as the statutory objectives and policies, if it believed that its effort to determine Title II's plain meaning would benefit from such an examination. *See Northwest Forest Resource Council* v. *Glickman*, 82 F.3d 825, 830 (9th Cir. 1996). The problem here, in part, is that its examination led it to the wrong result. The statutory structure does not support the panel's conclusion; nor does the statute as a whole. A careful examination merely tells us that the statute contains overlapping Titles. More significantly, the statute's objectives and policies not only do not support the holding the panel reaches, but compel the opposite result. Nowhere in its opinion does the panel suggest, nor could it, that any policy or objective of the ADA argues for limiting any of its provisions, including Title II, so as to exclude employment discrimination. To the contrary, the policies and objectives of the act were to eradicate all discrimination against the disabled by public entities in every area, including employment discrimination. It is a generous rather than a stingy reading of Title II that furthers the ADA's policies and objectives.

4. Summary

If anything is clear about this case, it is that the plain meaning of the statute is not what the panel says it is. No matter how apparent it may be that particular statutory language provides "X", a court can determine, if it chooses, that the statute does not provide "X"; and indeed, that "X" has nothing whatever to do with it. It can do so by holding that the statutory language plainly says what it plainly does not. A court can announce that the word "dog" plainly means "cat" if a panel so chooses, and a majority of eligible active judges then elects not to take the case *en banc*.

That is what happened here: Congress, by plain language (or "wording" as the panel insists on putting it) provided disabled persons with a Title II remedy for discrimination in public employment. The panel then held that the plain meaning of the statute is that it did not, and a majority of our active judges has now seen fit to allow the panel's erroneous pronouncement to stand.

What the panel and our court have done is of course not unique. Courts have in the past chosen on various occasions to read statutes as having precisely the opposite meaning from that dictated by the statutes' plain language. Even the Constitution has been the victim of this odd interpretive technique. The most prominent example is the perverse interpretation given to the Eleventh Amendment in *Hans* v. *Louisiana*, 134 U.S. 1, 14 (1890). There, the Court read the plain language of the Amendment, which stated that the federal courts lack jurisdiction to consider suits brought against a state by "citizens of another state" as having almost precisely the opposite meaning: that federal courts lack jurisdiction over suits brought against a state by citizens of the same state. The Court rejected the plaintiff's appeal to the plain language of the amendment as "an attempt to strain the constitution and the law to a construction never imagined or dreamed of." Justice Bradley, writing for the majority, declined even to give any policy justifications for the decision to ignore what he

called "the letter" of the law, saying "it is enough for us to declare" a contrary rule. 10 S. Ct. at 508. This ostensibly "plain" meaning was reaffirmed by a divided Supreme Court in 1987. *See Welch* v. *Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 492 (1987) (declining to overrule Hans on the basis of stare decisis). Today, this contrarian "construction" of the Eleventh Amendment's plain language lies at the heart of federalism's recent resurgence. *See Alden* v. *Maine*, 119 S. Ct. 2240, 1999 WL 412617, *13 (U.S. 1999) (following *Hans* in declining to "adhere to the mere letter" of the Eleventh Amendment).

Hans and other cases involving judicial failures to respect the plain meaning of words contained in the Constitution or in statutes do not, of course, excuse what our court does today. To the contrary, this latest example should cause great concern to those who volubly proclaim their fear that federal judges do not demonstrate sufficient respect for the decisions of other branches of government or for the Constitution's framers. Whether a congressionally granted right is invalidated under the guise of statutory construction or by reliance on a Constitutional doctrine conjured up by the judiciary, the result is the same; the will of the people has been improperly frustrated.

B. Legislative History

The panel is compelled to rely on "plain language" that is nowhere to be found in the statute because the legislative history of Title II overwhelmingly confirms that Congress did indeed intend to ban employment discrimination in Title II. If the statute were ambiguous - and that is the best that the panel could legitimately hope to prove by its wording and structure arguments - the legislative history would be dispositive. The House Judiciary Committee Report states that "in the area of employment, title II incorporates" the regulations under the Rehabilitation Act. H.R. Rep. No. 101-485(III) (1990). The House Report also states that Title II is intended to prohibit

forms of discrimination "identical" to those contained in Title I - which deals exclusively with employment discrimination - and that it is to "work in the same manner as section 504" of the Rehabilitation Act, which also prohibits employment discrimination. *Id.* at 84. Likewise, the Senate Labor Committee Report states that employment discrimination is prohibited by Title II: "The existence of non-disability related factors in the rejection decisions does not immunize employers" making adverse hiring determinations. S. Rep. No. 116, 101st cong., 1st Sess., at 45 (1989). As the Eleventh Circuit observed in *Bledsoe*, "extensive legislative commentary regarding the applicability of Title II to employment discrimination . . . is so pervasive as to belie any contention that Title II does not apply to employment actions." 133 F.3d at 821.

The panel's opinion never even acknowledges the existence of these authoritative Committee Reports and the clear evidence of congressional intent. The panel insists instead that the language and structure of the law unambiguously makes clear that Title II excludes "employment" discrimination from its scope. The reason the panel does not go beyond this point is evident. Unless the panel can base its decision on its argument that the plain language of the statute excludes employment discrimination from the coverage afforded by Title II, the argument is over. If the ADA is "ambiguous," then in light of the legislative history, Title II must be held to cover employment discrimination.

C. *Chevron* Deference

The panel is compelled to rely exclusively on its argument that Title II plainly and unambiguously excludes discrimination in employment for another reason as well. If the statute does not by its plain language compel exclusion of employment discrimination, and it is instead found to be ambiguous, *Chevron* deference also requires that we hold that Title II does indeed prohibit employment discrimination. Congress delegated enforcement of Title II to the Department of Jus-

tice, and directed it to promulgate regulations consistent with the regulations implementing the Rehabilitation Act. 42 U.S.C. § 12134. Moreover, as the House Judiciary Committee Report states, the Department of Justice was directed to specify the interpretation of the forms of prohibited discrimination where ambiguity existed and interpretation was required.

> Unlike the other Titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited. The Committee intends that the regulations under Title II incorporate interpretations of the term discrimination set forth in Titles I and III of the ADA to the extent that they do not conflict with section 504 regulations.

H.R. Rep. No. 485(III), 101st Cong., 2d Sess., at 52 (1989). This language was used in both the Judiciary and Education Committee Reports.

The Department of Justice, acting pursuant to this clear congressional command, issued regulations that straightforwardly apply Title II to employment discrimination. 28 C.F.R. pt. 35, App. A ("Title II of the ADA applies to all activities of public entities, including their employment practices."); 28 C.F.R. § 35.140(a) ("No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity."). If it is not plain from the language, structure, and legislative history that Congress intended to apply Title II to public employment, then, at the very least, it is uncertain whether or not it intended to do so. In such cases, the Department of Justice was authorized to fill in the gaps. The Department's interpretation is neither arbitrary nor manifestly contrary to the statute. Instead, these regulations faithfully adhere to Congress's intent, are well within the agency's discretion, and are thus controlling.

D. Conclusion

The plain language of the statute conclusively demonstrates that, as every other circuit to have considered the issue has concluded, Title II applies to employment discrimination. Both major clauses of the provision independently proscribe such discrimination. At the very least, the statute is ambiguous, and in that event, both the unequivocal legislative history and the uniform Department of Justice's regulatory interpretations, to which we must give deference, compel the conclusion that Title II applies to employment discrimination. Unquestionably, that is what Congress intended, and that is what the other circuit courts have readily understood. Here, the panel made a serious error of law in a case of great significance, where uniformity is necessary. Its holding that the plain language of Title II excludes employment discrimination is simply contrary to the applicable rules and precepts of statutory construction, as well as to all prior caselaw in the circuit courts. For these reasons, I dissent.